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September 6, 2019

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation by AmeriFactors Financial Group, LLC  
CG Docket Nos. 02-278 and 05-338

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's ("FCC's" or "Commission's") rules, the undersigned counsel for AmeriFactors Financial Group, LLC ("AmeriFactors") hereby submits this letter concerning AmeriFactors' Petition for Expedited Declaratory Ruling filed July 13, 2017 in the above-captioned proceedings ("Petition"). The Commission received comment on the AmeriFactors Petition in August and September of 2017, and the Petition is ripe for resolution.

In this submission, AmeriFactors updates the information it submitted in the Petition regarding the features and capabilities of online fax services.<sup>1</sup> Online fax services today offer functionalities that are not available with faxing using a traditional telephone facsimile machine. These added features confirm that an online fax service is different in nature and in kind from a traditional fax, offering capabilities not possible with use of a "telephone facsimile machine" as defined in the TCPA. Moreover, these features show that the view of "efaxes" in the *Westfax Order* was limited and incomplete at the time and, in any event, was based on the

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<sup>1</sup> AmeriFactors Financial Group, LLC, Petition for Expedited Declaratory Ruling, at 7-10, CG Docket Nos. 02-278 and 05-338, filed July 13, 2017 ("Petition").

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state of technology in 2009 that has been superseded in 2019. Therefore, this information provides further support for the Bureau to overrule the *Westfax Order* at this time.

### **Background**

In its Petition, AmeriFactors urged the Commission to declare that “fax” advertisements the recipient receives through online facsimile services or on a device other than a “telephone facsimile machine” are not subject to the Telephone Consumer Protection Act of 1991 (“TCPA”). In 1991 when the TCPA was first enacted, the justification offered for the restrictions on speech that would necessarily follow was the need to prevent the shifting of advertising costs from the sender to the recipient. With the fax technology at the time, facsimile messages were received by a traditional stand-alone fax machine. Thus, the statute makes it unlawful “to use any telephone facsimile machine, computer, or other device to send, *to a telephone facsimile machine*, an unsolicited advertisement.”<sup>2</sup> While many types of devices could originate a fax under the statute (reflecting the notion that any device might use fax protocols), the statute lists only one type of device that is relevant on the receiving end – the “telephone facsimile machine.” AmeriFactors urged the Commission to declare that transmissions received via online fax services were not received on a “telephone facsimile machine” and thus are not subject to the TCPA.

Yet, counsel for Plaintiff in the AmeriFactors litigation urges the Commission to rely on the Bureau’s 2015 *WestFax Order*,<sup>3</sup> which stretched the TCPA’s clear and unambiguous phrase to an illogical conclusion, blurred the lines between a “computer or other device,” on the one hand, and a facsimile machine, on the other hand, and found that facsimile messages that are received on fax servers are also prohibited under the TCPA.<sup>4</sup> To the extent that the *Westfax Order* remains good law,<sup>5</sup> AmeriFactors urges the Commission to repudiate the order.

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<sup>2</sup> 47 U.S.C. § 227(b)(1)(C) (emphasis added).

<sup>3</sup> *Westfax, Inc. Petition for Consideration and Clarification*, Declaratory Ruling, 30 FCC Rcd 8620, 8623 (¶ 10) (CG Bur. 2015) (hereinafter the “Westfax Order”).

<sup>4</sup> Career Counseling, Inc.’s Comments on AmeriFactors Financial Group, LLC’s Petition for Expedited Declaratory Ruling, at 4-6, CG Docket Nos. 02-278 and 05-338, filed Aug. 17, 2017. Commenter Biggerstaff has argued that online fax servers are “telephone facsimile machines” merely because they receive transmissions in fax protocols. Reply Comments of Robert Biggerstaff, at 3, CG Docket Nos. 02-278 and 05-338, filed Sept. 1, 2017 (“The systems that receive fax transmission via the fax protocols are – each and every one of them – a ‘telephone facsimile machine’ as defined by the TCPA”). This

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**Evidence in 2019 Demonstrates that Online Fax Services Have Different Capabilities than Traditional Fax Machines and are Materially Different than the Services Described in *Westfax***

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The *Westfax Order* declares that an “efax,” which it describes as “a document sent as a traditional fax and then converted to and then delivered to a consumer as an electronic mail attachment,” is subject to the fax provisions of the TCPA.<sup>6</sup> This description was based on a description provided by petitioner Westfax in September 2009. Westfax’s description of efaxes is three paragraphs long, encompassing less than half of a page of an 8-page (including cover page) petition.<sup>7</sup> In that petition, Westfax described an efax “in general” as merely “a facsimile message converted to an email.”<sup>8</sup>

AmeriFactors submits that Westfax’s bare-bones description did not accurately describe faxing technology in 2009, and its description wholly fails to capture the capabilities

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argument obliterates Congress’ careful distinction among the types of equipment covered by the statute. If merely using facsimile protocols makes a piece of equipment a “telephone facsimile machine” then every “computer or other device” using fax protocol also is a facsimile machine and the different language in the two clauses of Section 227(b)(1)(C) is meaningless. Biggerstaff’s focus on the use of facsimile protocols must, therefore, be rejected.

<sup>5</sup> In AmeriFactors’ June 13, 2019 letter, it explained that the D.C. Circuit’s decision in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) rejects the interpretation of the TCPA’s use of “capacity” that underlies the *Westfax Order*. See Letter from Steven A. Augustino, counsel to AmeriFactors, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 02-278 and 05-338 (filed June 13, 2019), at 2-5.

<sup>6</sup> *Westfax Order*, 30 FCC Rcd at 8623-24 (¶¶ 10-11).

<sup>7</sup> Westfax Petition for Consideration and Clarification, at unnumbered page 3, filed Sept. 24, 2009. The Westfax petition was not posted in full in dockets 02-278 and 05-338 until three years later, on October 23, 2012, when the FCC sought comment on the petition. See <https://www.fcc.gov/ecfs/filing/6017115022>; see also, Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Consideration and Clarification filed by Westfax, Inc.*, 27 FCC Rcd 13291 (rel. Oct. 23, 2012).

<sup>8</sup> Westfax Petition, *supra*, at unnumbered page 3.

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and features of online fax services today, in 2019. To illustrate, AmeriFactors submits five separate surveys of “best online fax services” available in 2019.<sup>9</sup> All of the surveys have been posted or updated since June 2019 and all provide an overview of the diversity and strengths of online faxing today.

These surveys consistently note the increasing obsolescence of traditional facsimile machines. For example:

- PCMag declares that “the prospect of buying a fax machine and paying for a dedicated landline to send the occasional fax probably seems ridiculous to most people and for good reason.”<sup>10</sup>
- Tom’s Guide states that, “faxing may seem so last century.”<sup>11</sup>
- Business.com declares it “ancient technology.”<sup>12</sup>
- TopTen Reviews condemns the paper fax machine as “a nightmare to use” and opines that “if you want to avoid the hassle of missing pages, paper jams and changing a toner, electronic fax services are the best option.”<sup>13</sup>
- Lifewire noted that, “you don’t have to invest in one [a fax machine] just to send a fax or even receive faxes.”<sup>14</sup>

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<sup>9</sup> AmeriFactors submits surveys by PCMag (Attachment 1), Tom’s Guide (Attachment 2), Business.com (Attachment 3), TopTen Reviews (Attachment 4) and Lifewire (Attachment 5).

<sup>10</sup> Attachment 1 at 16. PCMag also noted that, for the 2019 reviews, it was unable to test online fax services with a traditional facsimile machine because “we no longer have any fax machines or copper landlines in our office.” *Id.*

<sup>11</sup> Attachment 2 at 3.

<sup>12</sup> Attachment 3 at 1.

<sup>13</sup> Attachment 4 at 1.

<sup>14</sup> Attachment 5 at 1.

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By contrast, Business.com commented that, “the online fax industry shows considerable signs of growth. Offering a more efficient way of sending and receiving documents than its analog counterpart, online digital faxing is cheaper, more convenient and better for the environment.”<sup>15</sup>

As shown in these reviews, online fax services offer a number of features that are not available with a traditional fax machine. These include:

- The ability to send and receive faxes from the Internet or a mobile device. TopTen Reviews, for example, recommended that users choose a provider with an accompanying mobile app.<sup>16</sup>
- The ability to use encryption and other security features for faxes.<sup>17</sup>
- The ability to schedule outbound faxes.<sup>18</sup>
- The use of shared fax numbers and the ability to link multiple numbers to the same account.<sup>19</sup>
- The ability to share received faxes among multiple users simultaneously.<sup>20</sup>
- Support for sending documents in up to 50 file formats.<sup>21</sup>
- The ability to store and search received faxes.<sup>22</sup>

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<sup>15</sup> Attachment 3 at 4.

<sup>16</sup> Attachment 4 at 7.

<sup>17</sup> Attachment 2 at 8; Attachment 3 at 5; Attachment 4 at 7.

<sup>18</sup> Attachment 2 at 10.

<sup>19</sup> Attachment 4 at 3.

<sup>20</sup> Attachment 3 at 4.

<sup>21</sup> Attachment 2 at 4.

<sup>22</sup> Attachment 3 at 1; Attachment 2 at 8.

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- Customization features to address unwanted transmissions, including the ability to block faxes from senders without Caller ID or a separate inbox for junk faxes.<sup>23</sup>

Such features are not available with the traditional telephone facsimile machine defined in the TCPA. Rather, the state of online faxing technology is consistent with the trends described in AmeriFactors' *White Paper*, which documented the evolution and ultimate victory of the computer and the Internet over analog faxing.<sup>24</sup>

Moreover, none of the services automatically print received faxes, as the TCPA's definition of a "telephone facsimile machine" requires. Indeed, none of the surveys even describes the reviewed online fax services' printing capabilities or discusses whether faxes received via such services can be printed. This likely is because online fax services don't provide an inherent printing capability; any such printing, if it can be done, is accomplished through the use of other software obtained by the end user.

Finally, these surveys demonstrate that online fax services in 2019 bear little to no resemblance to the "efax" services described by Westfax in 2009. The features described in these surveys are far more robust than the Westfax petition's description of a "facsimile message converted to an email." Westfax did not describe the storage or searching capabilities that today's online fax services provide. Westfax also did not address the rise of mobile usage and the ability to both send and receive "faxes" via a mobile app. Moreover, the Westfax description in 2009 makes no mention of the encryption and security features that healthcare providers need to comply with HIPAA.

As a result of the above, AmeriFactors submits that the Commission is required to take a fresh look at the technology of faxing today. It may not rely upon the state of technology ten years ago (when *Westfax* was filed), or the state of technology at the time of the Commission's last pronouncement regarding "fax servers" in 2003. Instead, it must consider the vast technological changes that have occurred due to the rise in broadband Internet access, mobile device usage and cloud-based services. These changes render the *Westfax Order* and earlier Commission pronouncements inapplicable to AmeriFactors' Petition.

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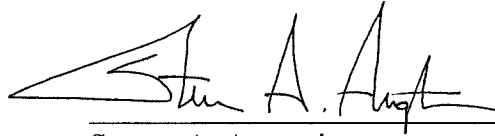
<sup>23</sup> Attachment 4 at 3-4.

<sup>24</sup> See AmeriFactors Financial Group, LLC, *White Paper on the First Amendment and the Fax Provisions of the TCPA*, at 7-18 (describing the technological changes since 1991) (submitted June 13, 2019).

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Moreover, these changes enable the Bureau to repudiate its previous conclusion in *Westfax* and to instead make a fresh determination based on the technology and record provided in this proceeding. AmeriFactors urges that Bureau to do so here, and recognize, as the five surveys of 2019 services attached here do, that traditional facsimile machines rely upon “ancient” and “obsolete” technology that is surpassed by the richer and more varied capabilities of online fax services. Therefore, the Bureau should conclude that transmissions received via online fax services are not received on a “telephone facsimile machine” and are not subject to the TCPA. To the extent that the *Westfax Order* would produce a different result, the Bureau should reject its previous conclusion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven A. Augustino", is written over a horizontal line.

Steven A. Augustino

*Counsel for AmeriFactors Financial Group,  
LLC*